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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 910

A. J. SIMLER,
Petitioner,

vs.

LESLIE L. CONNER AND PHILLIPS PETROLEUM COMPANY a Corporation,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

This is a diversity action filed in 1957 by the Petitioner, A. J. Simler, against the Respondent, Leslie L. Conner. The amount in controversy exceeds the sum of $10,000.00, exclusive of interests and costs. The opinion of the trial court in 1964 is reported at 228 F. Supp. 127. The opinion of the Court of Appeals affirming the trial court is reported in 352 F.2d 138, petition for rehearing denied on November 24, 1965. The opinion of the trial court, 228 F. Supp. 127, is set forth in Appendix A and the judgment of the trial court is set forth in Appendix B. Petitioner, who was plaintiff below, filed his petition in this court on January 14, 1966. No supersedeas bond has been filed.

STATEMENT OF THE CASE

Because Petitioner failed to make a required statement of the facts in this case we will supply same.

This particular case involving the attorney fee due Respondent Leslie L. Conner and other questions has been before this court on two previous occasions. *Simler* v. *Conner,* 368 U.S. 966, 82 S. Ct. 440, 7 L. Ed. 2d 395: reversed for jury trial, 372 U.S. 221, 83 S. Ct. 609, 9 L. Ed. 2d 691. After a jury trial was granted by this court the Petitioner Simler, at the pre-trial conducted by the trial judge, waived a jury trial and agreed to try the case to the court without a jury. In summary, the court found that in 1952 Respondent Conner, an attorney, had a written contingent attorney's fee contract with petitioner A. J. Simler, of Little Rock, Arkansas, to try to recover any interest for Simler in the Estate of Birdine Fletcher, his wealthy deceased sister, who had left her 160 acre oil farm, minerals, producing royalty and all her property to non-heirs and left A. J. Simler, her brother and sole heir at law *"$1.00, this amount and no more"*. A recovery of property of the value in excess of $879,926.00 was made for Simler by his attorney Respondent Conner in 22 court cases over a period of five years, from 1952 to 1957, when Simler took the recovered property and refused to pay Conner his contingent attorney's fee. There were three cases in the County Court; three cases in the District Court and three cases in the Supreme Court of Oklahoma; five cases in the Federal District Court and five cases in the Court of Appeals and three cases in the Supreme Court of the United States (See Findings of Fact, Paragraph 4 of Appendix A).

The trial court found that Conner was entitled to a contingent attorney's fee for the legal services performed in

the amount equal to 36% (thirty-six per cent) of the value of all property, and after allowing credits, entered a judgment for Conner in the amount of $290,975.59. The Petitioner Simler has paid from the funds in court as of this date $50,000.00 on this judgment.

The judgment provides that Respondent Conner receives 36% (thirty-six per cent) of all future oil income from the farm until the balance of the attorney fee is paid and if the income from the farm ceases then the Petitioner Simler is relieved from the payment of any balance due on the fee at that time, Appendix B.

The Petitioner Simler now accuses the trial court of failing to adhere to the pre-trial agreement. This agreement can best be answered by quoting the portion of the pre-trial transcript which contains the pre-trial agreement of the issues to be presented to the court and what would be considered in fixing value of the recovery and the manner in which the court would conduct the trial:

> (R. 205): "The Court: The Court is very concerned about the stipulation that you gentlemen will enter into to waive a jury and try it to the court. The fee contemplated of July 18th, 1952, of a reasonable fee of all that's recovered, that would be, of course, the farm, the surface, the minerals, and what have you? Now then, if Mr. Ogden is talking about money alone, . . . in order for the court to give a reasonable fee, based upon the value of the recovery, whether it be land or minerals or reserve minerals or reserve oil, I'd have to have some kind of a report showing how much the reserves are.
>
> Mr. Ogden: Sure (R. 206).
>
> The Court: Because the cash fee would be based upon the reserves the same as cash that is produced."
>
> (R. 207): "Mr. Ogden: Well if the court please, so you might better understand why I am making

even these statements, my client don't want to give up an inch of his land to anybody, or the minerals. He wants that.

The Court: Well, in my thirty-five years of practicing where I had title questions and took it on a contingent fee, I got part of that minerals, I got part of the surface and I got part of that farm house and the barn and the wells and everything else. Now, then, if you're going to take him out of that, you've got to determine the amount of reserves.

Mr. Ogden: Yes, sir."

It is abundantly clear from the two pre-trial hearings that Mr. Ogden, attorney for Mr. Simler, agreed to the methods and formulas the trial judge stated he was going to use in determining the value of the property recovered and the fee due to Mr. Conner.

The legal question of the pre-trial agreement was presented by Petitioner to the trial court on his motion for a new trial and also the amount of the judgment based on the valuation of the reserves. The same arguments were presented to the Court of Appeals by Appellant's Brief and by oral argument.

Here Petitioner uses the same argument and propositions as he did in the trial court and in the Court of Appeals, but has re-worded his propositions in an attempt to inject a constitutional question of due process of law. This is the first time on this appeal that Petitioner has attempted to raise a constitutional question. There was no attempt by the Petitioner to raise a constitutional question in the trial court or the Court of Appeals.

The Phillips Petroleum Company is the operator of the oil field and is a "stockholder" STAKEHOLDER in the case.

REASONS FOR DENYING THE WRIT

1. The petition for certiorari does not comply with Rule 15(A) and (H) and Rule 19 and Rule 23(B) (iii) and E of the Supreme Court.

2. The petitioner failed to raise the constitutional question of "denial of due process" in either the trial court or in the Court of Appeals.

3. There are no Court of Appeals decisions in conflict on the matter decided in this case, nor are there any federal statutes involved.

4. This case does not involve an important question of federal law which has not been settled by this court nor has the trial court or the Court of Appeals decided a federal question in conflict with decisions of this court.

5. There are no allegations or citations of cases that the findings of fact are clearly erroneous under 52(A) Federal Rules of Civil Procedure.

6. This court will not review a question of fact decided by the trial court without a jury.

ARGUMENT AND BRIEF OF AUTHORITIES

I

The Binding Effect of a Pre-Trial Agreement Upon the Trial Judge Does Not Present a Question of Due Process of Law.

The trial court adhered to the pre-trial agreement shown in the 59 pages of pre-trial transcript. There is no question but that counsel and the petitioner knew that in fixing the value of the 160 acre farm with producing oil

runs, the court would consider the value of the oil and mineral reserves in which the owner Simler would participate for the next 20 years. The Court of Appeals in its opinion 352 F.2d 138 after a careful review of the pre-trial agreement and the judgment specifically held (142):

> "Appellant puts stress upon the pre-trial proceedings and order to support his contention that the judgment, as rendered, violates what the parties had agreed upon. We find no merit to this contention. It is true that the parties agreed that Conner would not be given an interest in the property in payment of any fee due him. The judgment is in keeping with this agreement but it does properly give Conner a lien upon 36 per cent of Simler's interest in the minerals and mineral rights above 6400 feet until the full amount due Conner is paid." * * * "We do not believe that this lien provision violates the pre-trial agreement or order, because it gives Conner no ownership in the land or mineral rights."

Petitioner's first proposition in our opinion does not present to this court any justification for granting a writ of certiorari.

II.

Neither the Trial Court nor the Court of Appeals Disregarded State Law in Fixing the Attorney's Fee.

Petitioner argues that the trial court and Court of Appeals disregarded state law in approving the Respondents' attorney's fee. The trial court found that the value of property recovered for Petitioner by Respondent Conner to be $879,926.00 (Appendix A). When the value of the property of $879,926.00 is compared to the judgment of $290,975.59 it is clear that the attorney's fee does not exceed 50%. Counsel's argument that the fee exceeded the amount

allowed by law is in error. The Petitioner did not raise the question of the state statute in the Court of Appeals, however, if the question had been raised this Court in dealing with issues of state law will accept the determination of Courts of Appeal on questions of state law, and will do so where petitioner seeking certiorari does not contend there was an erroneous interpretation of state law. (*Richards* v. *U. S.*, 82 S. Ct. 585 (U.S. Okla.), 369 U.S. 1, 7 L. Ed. 2d 492).

III.

The Judgment Is Not Based on Speculation, Conjecture and Uncertainty and Does Not Deny the Petitioner Due Process of Law.

The contention by Petitioner that the judgment is based on speculation, conjecture and uncertainty is likewise without foundation. The judgment (Appendix B) specifically sets out the amount to be received by Respondent Conner at $290,973.59.

The judgment is to be paid from 36% of over $150,000 on hand in the clerk's office and 36% of the oil and gas runs from the oil wells until same is satisfied. This particular Fletcher Farm recovered by the Respondent attorney Conner for his client the appellant and petitioner Simler gets .05 interest in the Medrono Unit (4,300 acres) of which the Flethcer Farm is 160 acres. For years this interest has paid more than $3,000.00 per month on this Simler interest alone. Therefore, there is no interest in the land, only interest is in what oil and gas is produced to pay the judgment.

In *F. G. Cooper & Co.* v. *Brice,* 86 F. Supp. 308 (N.Y.), the district court entered a judgment for plaintiff in the amount of $96,000.00 ordered that all royalties be applied by the plaintiff to the payment of the judgment. In that

case the defendant was less fortunate because all of the royalties were applied to payment of the judgment and the judgment was not discharged if the royalties ceased to be paid.

The judgment in favor of Respondent Conner is just, fair and definite in amount.

IV.

The Petition for Writ of Certiorari Does Not State Any Grounds or Authorities Which Warrant a Review by This Court.

Petitioner's claims upon the merits have been fully considered and answered and decided by the trial court, reported in 228 F. Supp. 127, and by the United States Court of Appeals, Tenth Circuit, reported in 352 F.2d 138. There were no constitutional questions or federal statutes presented in the trial or appellate courts in this case. Therefore, this court should not decide questions which were not passed upon by the Court of Appeals. A point not raised before the FPC would not be considered by Supreme Court which had granted Certiorari to review Court of Appeals. *Sunray Mid-Continent Oil Co.* v. *FPC*, 80 S. Ct. 1392. See also *Wisconsin* v. *FPC*, 83 S. Ct. 1266, 373 U.S. 294, 10 L. Ed. 2d 357. On certiorari, Supreme Court would not decide questions not dealt with by Circuit Court of Appeals. *Owens* v. *Union Pacific R. R.*, 63 S. Ct. 1271, 319 U.S. 715, 87 L. Ed. 1683. No substantial federal questions are claimed, cited or involved as required by the Rules of this court and under *McArthur* v. *U. S.*, 62 S. Ct. 915, 315 U.S. 787, 86 L. Ed. 1192, the petition should be denied.

There is no conflict alleged between Court of Appeals decisions. There is no constitutional or federal question presented or involved.

The decision of the trial court was on a question of fact, that is, the amount of a reasonable contingent fee and the Court of Appeals opinion affirming the lower court sets this out. Where trial has been by court without jury, Judge's Findings of Fact should not be set aside unless clearly erroneous. Rule 52(A), Federal Rules of Civil Procedure, 28 U.S.C.A. *Krunholz* v. *Goff*, (315 F.2d 575, 6th 1963). *Bauman* v. *Choctaw, Chickasaw Nations*, (C.A. 10th) 333 F.2d 785, certiorari denied 85 S. Ct. 658, 379 U.S. 965, 13 L. Ed. 2d 559.

Petitioner has presented no acts or law that would be violative of due process even if the question had been properly raised in the lower courts. In closing it should be noted that this attorney increased the Petitioner's inheritance over 800,000 times and he should be paid and this litigation ended.

It is respectfully submitted that Petitioner has presented no grounds for certiorari under due process and that his petition should be denied.

Respectfully submitted,

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January, 1966.

APPENDIX A

A. J. SIMLER, Plaintiff,

v.

Leslie L. CONNER, Defendant.

Phillips Petroleum Company, a Corporation,
Additional Defendant.

No. 8008.

United States District Court
W. D. Oklahoma.

April 1, 1964.

Client brought diversity action against attorney and another to fix a reasonable contingent attorney's fee for attorney under contingent fee arrangement. The District Court, Bohanon, J., held that evidence established that reasonable contingent attorney's fee for extensive legal services rendered by attorney in successfully contesting will was 50% of total recovery by client less 14% offset.

Judgment in accordance with opinion.

1. Courts, Key 308

Where resident of Arkansas brought diversity action in federal District Court in Oklahoma against individual, who was resident of Oklahoma, and corporation, which had its principal place of business in Oklahoma, and which had no interest in controversy except as stakeholder, and amount in controversy, exclusive of interest and costs, exceeded sum of $10,000, District Court had jurisdiction of parties and subject matter of action.

2. Attorney and Client, Key 148(3)

Evidence established that reasonable contingent attorney's fee for extensive legal services rendered by attorney in successfully contesting will was 50% of total recovery less 14% offset. 5 Okl.St.Ann. § 7; Canons of Professional Ethics, canon 12, c. 1, 5 O.S.A.Appendix.

3. Attorney and Client, Key 147

Contract, by which client employed attorney to contest will, and which provided for reasonable contingent fee to be fixed by court, was valid and enforceable in Oklahoma. 5 Okl.St.Ann. § 7; Canons of Professional Ethics, canon 12, c. 1, 5 O.S.A.Appendix.

4. Attorney and Client, Key 151

Where client and his attorney entered into contract, by which client employed attorney to contest will, and which provided for reasonable contingent fee to be fixed by court, and attorney, with knowledge and consent of client, employed second attorney to assist him for 28% of fee, written assignment by second attorney of 28% fee to client for $12,000 was valid, and client was entitled to deduction of 28% of fee awarded to first attorney.

5. Attorney and Client, Key 175, 182(4)

Where evidence established that reasonable contingent attorney's fee for extensive legal services rendered in successfully contesting will was 50% of total recovery less 14% offset, attorney was entitled to lien on 36% of minerals and mineral rights awarded to client until attorney was paid 36% of total recovery by client or there was no further production of oil and gas.

6. Federal Civil Procedure, Key 2737

Where evidence established that reasonable contingent attorney's fee for extensive legal services rendered by attorney in successfully contesting will was 50% of total recovery less 14% offset, costs would be assessed against client to extent of 64% and against attorney to extent of 36%.

7. Attorney and Client, Key 140

In determining reasonableness of attorney's fee, many varied and complicated facts must be considered, and there is no fixed standard or guide by which triers of fact can be materially assisted, and entire picture must be considered to arrive at just conclusion, fair to all parties. 5 Okl.St.Ann. § 7; Canons of Professional Ethics, canon 12, c. 1, 5 O.S.A.Appendix.

John B. Ogden, Oklahoma City, Okl., for plaintiff.

Paul C. Duncan, Oklahoma City, Okl., for defendant Conner.

Cecil C. Hamilton, Oklahoma City, Okl., for defendant Phillips Petroleum Co.

BOHANON, District Judge.

[1] The plaintiff, A. J. Simler, was at all times mentioned herein a citizen and resident of the State of Arkansas. The defendant Leslie L. Conner was at all times mentioned herein a citizen and resident of the State of Oklahoma. The defendant Phillips Petroleum Company, a corporation, has its principal place of business in the State of Oklahoma. The amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000, and therefore the Court has jurisdiction of the parties and the sub-

ject matter of this action. The defendant Phillips Petroleum Company has no interest in this matter except as a stakeholder, and it will not be necessary to further refer to this company except in that capacity.

The parties to this litigation at pretrial hearing stipulated to waive a jury trial and agreed to try the case to the Court.

This case involves the fixing of a reasonable attorney's fee for the defendant Conner under a contingent fee arrangement with the plaintiff Simler.

The case was tried to the Court on February 10 and 11, 1964, and the Court, having heard and duly considered all of the pleadings, depositions, evidence, and exhibits, finds the essential facts as follows:

Findings of Fact

1. Birdine Fletcher owned the Northwest Quarter of Section 34, Township 6 North, Range 10 West, Caddo County, Oklahoma, together with other property. She made a Will dated July 9, 1952, in which she devised to A. J. Simler, her brother and only heir, "the sum of $1.00, this amount and no more." And the remainder of her estate to others, and the particular land in question to Mt. Alverno Convent and St. Joseph's Hospital, both of Maryville, Missouri, and St. Anthony Hospital of Oklahoma City, in equal shares. Mrs. Fletcher died testate in Oklahoma City on July 13, 1952, and her Will was filed for probate in Oklahoma County on July 14, 1952.

2. The plaintiff Simler, on July 18, 1952, employed the defendant Conner, a licensed and practicing attorney, by written contract, to represent him, in contesting the Will of his sister and to recover on his behalf all or part of the assets of the estate of his sister. This contract pro-

vided for a reasonable contingent fee to be fixed by the Court. In compliance with this contract Conner performed valuable services for and on behalf of Simler, which were successfully completed by defendant in May, 1957, resulting in the recovery for the plaintiff of accumulated oil and gas runs, and the above described 160 acres of land with the sixteen producing oil wells thereon, subject to an oil and gas lease in favor of the defendant Phillips Petroleum Company and assigns.

3. The defendant Conner, with the knowledge and consent of Simler, employed other attorneys to assist him in the litigation for the recovery of the above described property. Conner employed Mr. James E. Grigsby and Mr. Phil Daugherty, both licensed practicing attorneys in Oklahoma City, who were to be paid for their services a part of the proceeds, if any, from Conner's contingent fee contract, when such services had been completed. On September 25, 1952, plaintiff and defendant agreed in writing that a "reasonable contingent attorney's fee" as provided in the contract of July 18, 1952, would be a graduated fee of 25 per cent if the case was settled, 33⅓ per cent if tried, and 50 per cent if it was necessary to appeal, or defend an appeal in the Supreme Court, and it was under the terms of this letter that Conner employed Mr. Daugherty and Mr. Grigsby. At pretrial conference it was stipulated by the parties and their attorneys that defendant would not rely on the contract of September 25, 1952, but that the contingent attorney's fee should be fixed by the Court, without a jury, to be paid in money only, and that Conner and his associates relinquished their rights to any interest in the real estate above described and the oil and gas production therefrom, except as hereinafter stated.

4. The defendant Conner investigated the facts of the case, and made an extensive research of the law, and per-

formed an enormous amount of trial services for the plaintiff Simler. The legal services rendered by the defendant Conner covered a period from July 18, 1952 through May, 1957, and during this time there was continuous investigation, legal research, trial of cases, preparing appeals, and defending appeals in the Supreme Court of the State of Oklahoma, the Court of Appeals, Tenth Circuit, and the United States Supreme Court, which, of course, necessitated a great deal of work in the matter of legal research, preparing briefs, and making oral arguments before these Courts. The defendant Conner contested the Will of Simler's sister, Birdine Fletcher, in the County Court of Oklahoma County in Case No. 31726, and this case was twice appealed to the District Court of Oklahoma County, and these cases then appealed to the Supreme Court of the State of Oklahoma, and there became cases No. 36075, In re Fletcher's Estate, 269 P.2d 349, and No. 37365, 308 P.2d 304. Four separate cases were filed in the United States District Court for the Western District of Oklahoma by the defendant for the plaintiff. There were three appeals to the Court of Appeals, Tenth Circuit, from these cases. Also there were three appeals to the Supreme Court of the United States from the Court of Appeals, Tenth Circuit, being cases No. 677 (1954), Wilson v. Simler, 347 U.S. 954, 74 S.Ct. 681, 98 L.Ed. 1099; No. 510 (1955), 348 U.S. 929, 75 S.Ct. 342, 99 L.Ed. 728; and No. 409 (1955), 350 U.S. 892, 76 S.Ct. 153, 100 L.Ed. 785. Also there was one original action filed by the plaintiff in the Court of Appeals, Tenth Circuit, No. 5201 (not reported). Conner successfully defended an original action in the Supreme Court of the State of Oklahoma, filed against the plaintiff by the Executor of the Estate of his deceased sister, and the Sisters of St. Francis, the residual beneficiary of the Will. This suit was an attempt to defeat Federal Court litigation. And the defendant Conner successfully de-

fended another action filed in the District Court of Oklahoma County against plaintiff and his attorneys.

5. Attorney Grigsby was employed by Conner on the basis of 28 per cent of Conner's fee. Mr. Grigsby filed suit against plaintiff; Conner could not represent Simler and he employed John B. Ogden and paid him a fee of $7,500, and here claims credit for this $7,500 expense. Mr. Grigsby disassociated himself with the litigation before it was completed and assigned to Simler this 28 per cent in Conner's contingent fee, for which he received a note of $12,000, secured by a mortgage on the above-described land. This note was paid and the mortgage released.

6. From July 18, 1952, to the last of May, 1957, the income from the described farm was paid to W. H. Wilson, Executor of the Estate of Birdine Fletcher, deceased. As a result of the legal services performed by Conner, Simler has been paid in cash by the Executor of the Fletcher Estate the sum of $88,446.62; from June 1, 1957, to February 11, 1964, the defendant Phillips Petroleum Company, from oil and gas sales, has paid into the Clerk's office the sum of $238,431, pursuant to an order of this Court. From this sum, by Court order, Simler was paid $47,163.50, making a total sum received by Simler of $135,610.12. There remains in the office of the Clerk of this Court the sum of $191,267.50.

7. The Court finds that as of the first day of June, 1957, the proved primary and secondary oil, gas and mineral reserves, and undeveloped oil and gas reserves, above the 6400 foot level, that is, 6400 feet from the surface of the land, to the interest therein recovered by Conner for Simler, had a total value as of that date and future realization to Simler of $779,480.

The Court finds that the value of the surface rights of the farm as of the date of the completion of Conner's services was $12,000.

8. By stipulation of the parties, it was agreed that plaintiff Simler advanced and paid out as litigation expenses and costs the sum of $5,000, for which he is entitled to reimbursement out of the funds on deposit with the Clerk of this Court.

9. The defendant Conner has been paid by the plaintiff Simler the sum of $24,000.

[2] 10. The Court finds that a reasonable contingent attorney's fee for all the services rendered to the plaintiff Simler by the defendant Conner as hereinabove enumerated is 50 per cent of the June, 1957, value of the total recovery, which includes property, cash, and oil and gas mineral interests. From this fee percentage, the Court finds that Simler is entitled to offset against the same 28 per cent of said 50 per cent (or a total of 14 per cent offset) and that Simler is entitled to 64 per cent of all the recovered property, money, and oil and gas interests, plus $5,000, as above found, for litigation expenses and costs, and that Conner should receive and recover 36 per cent of the cash value of all the recovered property; that the respective percentages of the cash on hand, and accruing, be paid to the respective parties as above outlined, and that the defendant Conner should have a lien on the property for the unpaid balance of his fee, to the extent of 36 per cent of the income from the oil, gas and other production from the above-described farm, and that Simler is entitled to the remaining 64 per cent.

11. The Court finds that Conner and his associates should be denied any permanent interest in the surface of the above-described land or any interest in the rents and

profits during past years or future years (other than above stated).

12. At the close of all the evidence in this case, the Court made an oral declaration of his findings and judgment which was not intended to be all-inclusive, and made no finding as to an item of expense of $7,500 incurred by Mr. Simler for attorneys' fees to represent him in the case filed by Mr. James E. Grigsby. Upon full consideration of this phase of the case, the Court now finds that the defendant Conner should not be charged with any part of this expenditure. The Circuit Court opinion decreed the Fletcher farm to be the property of Simler and held that the charitable foreign corporations, Mt. Alverno Convent and St. Joseph's Hospital, of Maryville, Missouri, and St. Anthony Hospital, of Oklahoma City, under the Constitution of the State of Oklahoma could not have and receive title to the Fletcher farm. Thereafter certain distributions were made to Simler. Attorney Grigsby, who had been employed by Conner on the basis of 28 per cent of the Conner fee, made demand for his portion of that distribution. Mr. Simler declined distribution; the reasons here are not important. Grigsby filed suit for his portion of the fee based upon his contract with Mr. Conner. Mr. Conner declined to represent Mr. Simler in the litigation because of the relationship between Conner and Grigsby, and it resulted in Mr. Simler employing Mr. John Ogden as his attorney in that matter. This suit resulted in Mr. Simler paying to Mr. Grigsby the sum of $12,000 for an assignment of the 28 per cent of the Conner fee, otherwise Grigsby's interest in the Conner fee contract. Mr. Simler paid Mr. Ogden the sum of $7,500 attorney's fee in the Grisby-Simler lawsuit, and Simler here is claiming a refund of this amount.

In allowing Mr. Simler credit for the full 28 per cent of Mr. Grigsby's interest in Mr. Conner's fee, the Court finds that basically the attorney's fee allowed in this case is slightly more than 36 per cent.

In making the fee allowance, the Court denies Conner and his associates any interest in the oil and gas or other mineral reserves in the following known producing horizons:

(a) The Gilcrease Sand above the Hunton Lime.
(b) Hunton Lime Formation.
(c) Simpson Formation.
(d) Upper and lower Dolomite.
(e) Wilcox Sand Formation.
(f) McLish Sand Formation.
(g) Oil Creek Sand Formation.

Except as these formations may be obligated to pay the judgment lien in favor of Conner.

The experts who testified at the hearing in this case stated it was their opinion that the above-named formations did underlie this land below the 6400 foot level, and the right to explore these formations and produce the oil and gas therefrom had considerable value, although no specific value could be placed thereon. Conner and his associates are denied any interest in these valuable rights.

Conclusions of Law

[3] 1. Defendant Leslie L. Conner's contract dated July 18, 1952, is a contingent fee contract dependent upon recovery and is valid and enforceable in Oklahoma. That attorney's contingent fee contract not to exceed 50 per cent of the recovery is provided for and allowed by the Statutes

of the State of Oklahoma, Title 5 O.S.A., Section 7, which statute was in force and effect on July 18, 1952.

2. That as a result of all the legal services performed for A. J. Simler by the defendant, Leslie L. Conner, the plaintiff, A. J. Simler, contrary to the terms of his sister's Will, and as a result of the contest thereof, became the owner of the real property and all the oil, gas and minerals therein subject to existing oil and gas leases, described as:

> Northwest Quarter (NW/4) of Section Thirty-four (34), Township 6 North, Range 10 West of the I.M.,
>
> in Caddo County, Oklahoma,

and all accumulations, monies, runs, and things incident thereto, all of which he has accepted.

[4] 3. That the written assignment by James E. Grigsby to A. J. Simler of the 28 per cent contingent fee contract of any contingent fee awarded Leslie L. Conner is valid. That the plaintiff, A. J. Simler, is entitled to 28 per cent of any attorney's fee hereinafter awarded to the defendant, Leslie L. Conner, which 28 per cent shall be deducted and retained by A. J. Simler from the fees of Leslie L. Conner.

4. That plaintiff, A. J. Simler, is to be paid the sum of $5,000 as the stipulated amount of his expenses and to reimburse him therefor.

5. The Court concludes that there has been paid from the estate of Birdine Fletcher to A. J. Simler the sum of $88,446.62, and by Phillips Petroleum Company, a corporation, the sum of $238,431 into the registry of this Court, being a total amount of $326,877.62, less $5,000 expense money to be paid A. J. Simler, leaving a balance of $321,877.62. That the defendant, Leslie L. Conner, is en-

titled to 50 per cent of $321,877.62, which is $160,938.81, less $45,062.86, which is 28 per cent thereof, leaving a total sum of $115,875.95 due Leslie L. Conner from the cash on hand. That plaintiff, A. J. Simler, is entitled to credit of $24,000 from this amount, leaving a net balance to be paid by the Clerk of this Court to defendant, Leslie L. Conner of $91,875.95. That the value of the surface of the property as of May, 1957, was $12,000. That Leslie L. Conner is entitled to be paid immediately by the Clerk of this Court an additional $4,320, which is 50 per cent of $12,000 surface value, less the 28 per cent Grigsby interest of A. J. Simler. That any other funds held by any other persons, firms, or corporations, or hereafter paid into this Court, attributable to this described Fletcher Farm are to be distributed by the Clerk of this Court 64 per cent to A. J. Simler and 36 per cent to Leslie L. Conner.

[5] 6. That in addition thereto, the defendant, Leslie L. Conner, is entitled to 50 per cent of $541,049, being the remaining value of the oil, gas, minerals interest in the above described farm as of the first day of June, 1957, which was $779,480, less the production and cash paid therefrom to the Clerk's office from June, 1957, to February 11, 1964, of $238,431. That the plaintiff, A. J. Simler, is entitled to set off from the 50 per cent of $541,049 (which is $270,524.50) an amount equal to 28 per cent thereof, which is $75,746.86, leaving a net amount to be paid to defendant, Leslie L. Conner, from the future oil, gas, mineral and produced reserves of said property, of $194,777.64. That out of the income from the production from the Northwest Quarter of Section 34, Township 6 North, Range 10 West, Caddo County, and any and all units of which it is a part or entitled to participate, there will be paid in monthly payments by defendant Phillips Petroleum Company, a corporation, and assigns, and any other companies producing from said property beginning after February 11,

1964, the following proportions, to-wit: 36 per cent thereof to Leslie L. Conner, and 64 per cent thereof to A. J Simler, until the amount of $194,777.64 has been paid in full by them to Leslie L. Conner or his assigns, and then all of said remaining interest and payments reverts to A. J. Simler, and Leslie L. Conner is granted a lien on 36 per cent of the Simler minerals and mineral rights until this payment is paid or there is no further production.

7. That defendant, Leslie L. Conner, shall have the right, power, and authority to sign any instruments, assignments, leases, division orders, and such other instruments as affecting this oil payment on this described farm as he may deem necessary to effectuate this judgment, or to pool, unitize, waterflood for primary or secondary recovery for any orderly development thereof.

[6] 8. That the costs of this case are assessed against A. J. Simler to the extent of 64 per cent, and to Leslie L. Conner to the extent of 36 per cent.

9. The Court directs the entry of a judgment in favor of the defendant, Leslie L. Conner, and against plaintiff, A. J. Simler, in conformity with these findings of fact and conclusions of law.

[7] In making a determination of the reasonableness of an attorney's fee, many varied and complicated facts must be taken into consideration. There is no fixed standard or guide by which the triers of the fact can be materially assisted, but the entire picture must be considered to arrive at a just conclusion, fair to all parties.

The Canons of Professional Ethics adopted in Oklahoma, Title 5, Chapter 1, Appendix 3, Oklahoma Statutes 1961, in pertinent part provide:

> "In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty

and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

"In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee.

"In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade."

In 7 C.J.S. Attorney and Client § 191, pages 1080, 1081, it is stated:

"The reasonableness of the fee charged or allowed must be determined like any other fact in issue in a judicial proceeding, and in making such determination all the facts and circumstances of the particular case, including so far as applicable those enumerated herein below, must be taken into consideration.

"In determining what is a reasonable attorney's fee or allowance for legal services rendered, many and varied

elements or factors are to be considered. Among the principal elements or factors to be considered are the amount and character of the services rendered, the nature, and importance of the litigation or business in which the services were rendered, the degree of responsibility imposed on, or incurred by, the attorney, the amount of money or the value of the property affected by the controversy, or involved in the employment, the degree of professional ability, skill, and experience called for and exercised in the performance of the services, and the professional character, qualifications, and standing of the attorney, and also the amount recovered."

The general statements above quoted are helpful and, of course, should be considered, and the respective elements or facts to be considered must be viewed in light of the relative importance in the particular litigation for which an attorney's fee is sought and determined. The general rules, supra, have been considered and adopted by the Supreme Court of Oklahoma. See Miller, et al v Burkett, 191 Okl. 521, 130 P.2d 996; Driver, Plaintiff-in-Error, v. Tolstornog, et al., (Okl.) 358 P.2d 1108.

The Tenth Circuit, in United States v. Anglin & Stevenson, et al., 145 F.2d 622, had under consideration the allowance of attorneys' fees awarded by the United States District Court for the Eastern District of Oklahoma, and at page 630, Judge Murrah aptly stated:

"The allowance of 25% of the amount recovered is well within the proof adduced on this record in support of a reasonable attorney's fee, and it is well settled that in cases of this kind the allowance of attorneys' fees is within the judicial discretion of the trial Judge, who has close and intimate knowledge of the efforts expended and the value of the services rendered. And an appellate Court is not warranted in overturning

the trial Court's judgment unless under all of the facts and circumstances it is clearly wrong."

City of Wewoka v. Banker, 10 Cir., 117 F.2d 839.

Based upon a full consideration of all the facts, circumstances, and conditions surrounding the litigation out of which this case arises, and having heard and observed the witnesses on the witness stand, the Court feels that the amount of attorney's fee fixed by the Court is just, fair and reasonable.

APPENDIX B

"Judgment

"Based upon the Findings of Fact and Conclusions of Law contained in the Court's Opinion filed in this cause, the Court enters the following judgments:

"It Is Therefore Ordered, Adjudged and Decreed by this Court:

"1. That from the monies on hand in the Registry of this Court the Clerk pay to A. J. Simler the sum of $5,000 to reimburse him for past litigation expenses incurred by him.

"2. The defendant Leslie L. Conner is granted a judgment against A. J. Simler in the sum of $290,973.59 for his contingent attorney's fee, as an economic interest in and payable from the oil and gas runs from the property hereinafter described, including cash on hand in the Registry of this Court as of the date of this judgment.

"3. That the Clerk of this Court pay from the Registry of this Court from the funds on hand, less the sum of $5,000 set forth in paragraph '1.' above, 64 per cent of

said fund to A. J. Simler, and 36 per cent of said fund to Leslie L. Conner.

"4. All costs accrued shall be deducted from the respective parties' interest on the basis of 64 per cent to be charged against A. J. Simler, and 36 per cent against Leslie L. Conner. All future costs, if any, shall be charged against the parties on the same percentage basis.

"5. All sums paid to Leslie L. Conner shall be credited to A. J. Simler against the total Judgment herein rendered.

"6. Any portion of the Judgment in favor of Leslie L. Conner which remains unpaid shall be paid by Phillips Petroleum Company, a corporation, or any other crude oil or gas purchaser, their successors or assigns, from the production attributable to the A. J. Simler interest, from proceeds of the sale of oil, gas, or other minerals, or from bonuses, leases, or production interests from the land described as the Northwest Quarter (NW 1/4) of Section 34, Township 6 North, Range 10 West, Caddo County, Oklahoma, known as the Fletcher Farm in the West Cement Medrano Unit and Noble Olsen Unit, which is to be paid direct to Leslie L. Conner by Phillips Petroleum Company, a corporation, or any other crude oil and gas purchaser or purchasers, or any firm, or corporation, producing, taking or using any oil, gas, mineral rights or interests from said land, or which said land is entitled to receive by any type of agreement, unitization or otherwise.

"7. This Judgment in favor of Leslie L. Conner shall not draw interest except if payments are withheld to Leslie L. Conner by reason of any actions taken by or on behalf of A. J. Simler, then interest on said unpaid payments shall bear interest at the rate of 6 per cent per annum until paid."

"8. That 36 per cent of the proceeds from the sale of future oil, gas, leases, or other mineral interests in and under, or attributable to the described land, is hereby transferred, conveyed and assigned to the defendant Leslie L. Conner until the full amount of this Judgment is paid; provided, however, if said land ceases to produce oil or gas or other minerals in commercial quantities, and by any method of recovery, then the plaintiff A. J. Simler is relieved from the payment of the unpaid balance.

"9. That the plaintiff, A. J. Simler, is hereby directed to execute and deliver all assignments, division orders and such other instruments as may be necessary to effectuate this Judgment in full and as herein directed to the end that the defendant shall receive his money and his part of the monthly oil runs and checks. If the plaintiff, A. J. Simler, does not execute and deliver the above assignments, Division Orders and such other instruments within five (5) days from the filing of this Judgment, then this Judgment shall constitute such assignments, division orders and other instruments the same as though the same has been executed and delivered by A. J. Simler to the oil companies producing oil and/or gas from the land described herein. That the defendant, Leslie L. Conner, shall have the right, power, and authority to enter into any agreements affecting his oil runs of his interests in the minerals, or to pool, unitize, waterflood, or sign for primary or secondary recovery, in order that the minerals be produced, sold and the pool may be orderly developed and waterfloods put into effect, and to that end the Court retains jurisdiction over the property, subject matter and parties until the remaining Judgment is paid in full. That defendant, Leslie L. Conner, is granted a lien on the property until the complete payment of this Judgment.

"10. That the Court retain jurisdiction of this case and Judgment for all purposes until the same is paid in full.

"Dated this 1st day of April, 1964.

"Luther Bohanon
"United States District Judge

"Judgment Entered in Civil Docket on April 1, 1964.
"Filed April 1, 1964."